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RASHID ASARI & CO v. DYNAC SDN BHD

HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[APPEAL SUIT NO: 12ANCC-8-12-2014]
4 SEPTEMBER 2015

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CIVIL PROCEDURE: *Parties – Addition of co-defendant – Sale and purchase of shares – Solicitor appointed as stakeholder – Earnest money with solicitor to be refunded if purchaser abort purchase of shares – Purchaser no longer interested in transaction and demanded for refund – Vendor instructed solicitor to continue holding earnest money – Purchaser commenced legal proceedings against solicitor for release of earnest money and proposed to add vendor as co-defendant – Whether proposed co-defendant had equal right and/or interest in earnest money – Rules of Court 2012, O. 15 r. 16(2)*

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The respondent was the purchaser on one part whereas one Tuan Haji Abu Bakar ('THAB') and Dijuta Sdn Bhd were the collective vendors ('the vendors') on the other part in a sale and purchase of shares transaction. An earnest money in the sum of RM500,000 was deposited with the appellant as the stakeholder solicitor for the said transaction. The earnest money was to be treated as part of the payment of the purchase price in the event the

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respondent purchased the shares in Second Port Logistics Sdn Bhd ('SPLSB'). The appellant was to refund the earnest money to the respondent within three months should the respondent decide not to proceed with the purchase of shares in SPLSB. The respondent was no longer interested to continue with the transaction and demanded for the refund of the earnest money but THAB

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instructed the appellant to continue holding the same. The respondent commenced legal proceedings against the appellant in the Sessions Court for the release of the earnest money and filed an application pursuant to O. 15 r. 16(2) of the Rules of Court 2012 seeking to join and add THAB as the second defendant ('the application') on the grounds that (i) all matters in

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dispute may be effectually and completely determined and adjudicated upon; and (ii) it would be just and convenient to have the issue relating to or connected with the earnest money be determined not only as between the respondent and the appellant but also as between THAB and the appellant as well. The Sessions Court dismissed the application. Hence, the present

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appeal.

Held (allowing appeal with costs):

(1) The dispute arose when the respondent decided not to continue with the said transaction and demanded for the release of the earnest money to them. As THAB was equally having interest in the earnest money, if the

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appellant were to concede to the respondent's demand and release the earnest money to the respondent, the appellant will then expose themselves to possible action being brought by THAB against the

appellant for wrongful release of the stakeholder sum. Instead, what the appellant, as a stakeholder, sought to achieve was that they would be acting correctly and in accordance with the law when releasing the earnest money to the purchaser or the vendors, as the case may be. (para 14)

(2) The appellant's role as a stakeholder was to hold the earnest money as an agent for both the purchaser and the vendors and the appellant was having an obligation to both the parties. The earnest money had been deposited by the respondent as a consideration to the vendors in accepting the respondent's offer to purchase their shares in SPLSB. Therefore, as one of the vendors, THAB was equally having a right and/or interest in the earnest money. It was evidenced that both parties had agreed to continue with the transaction of purchasing the shares and the appellant had been instructed by THAB to continue with the holding of the earnest money. (para 16)

(3) It was absolutely prudent to bring all the parties involved in the disputes arising out of the same subject matter before the court so that the dispute could be effectually and completely adjudicated and determined upon without any semblance of delay, inconvenience and expense of a separate trial. If the appellant were to concede to the respondent's demand, it would be an injustice done to THAB as he was not given an opportunity to be heard before any order or judgment be made in the action which would directly and adversely affect his rights/interests to the earnest money. (para 17)

Case(s) referred to:
Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***
Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 15 rr. 6(2)(b), O. 16 r. 2

For the appellant - M/s Chan Leong & Co
For the respondent - M/s Lee Hishamuddin Allen & Gledhill

[Appeal from Sessions Court, Shah Alam; Suit No: B52NCC-105-07-2014 (overruled)]

Reported by Najib Tamby

JUDGMENT

Rozana Ali Yusoff JC:

Introduction

[1] This is an appeal by the appellant's/defendant's (appellant) against the decision of the learned Sessions Court Judge who had dismissed the defendant's application to join Tuan Haji Abu Bakar bin Ibrahim (THAB) as

the second defendant. The respondent/plaintiff (respondent) commenced a legal proceedings against the appellant for the release of RM500,000 being the earnest money which was deposited with the appellant in their capacity as stakeholder solicitors in the sale and purchase of shares transaction.

Background

[2] The respondent was the purchaser on one part whereas THAB and Dijuta Sdn Bhd (the vendors) were collectively the vendors on the other part in a sale and purchase of share transaction. The earnest money was part of the terms and conditions contained in a letter of intent and confidentiality dated 21 November 2013 from the respondent to the vendors as a consideration to them in accepting the respondent's offer to purchase the shares belonging to them in a company known as Second Port Logistics Sdn Bhd ("SPLSB"). At all material time, the earnest money was kept and still being kept by the appellant in a fixed deposit account in the bank.

[3] Pursuant to the letter of intent and confidentiality dated 21 November 2013, the earnest money was to be treated as part of the payment of the purchase price in the event the respondent purchased shares in Second Port Logistics Sdn Bhd (SPLSB). The terms and conditions, *inter alia*, to refund the earnest money to the respondent within three months from 6 December 2013 should the respondent have decided not to proceed with the purchase of shares in SPLSB.

[4] On or about 24 February 2014, the appellant was informed that the respondent was no longer interested to continue with the transaction and had asked for the release of the earnest money. After a discussion and meeting held between THAB and one Dato Abdul Rahman, the Managing Director of respondent company, the appellant on 1 March 2014 was informed by THAB that both parties had agreed to continue with the transaction. Subsequent to that, the appellant had been instructed by THAB to continue with the holding of the earnest money.

[5] The respondent had, through its previous solicitor, Messrs Ishak Sharif & Co wrote to the appellant on 24 February 2014 informing the appellant of its decision not to proceed with the purchase of shares in SPLSB and demanded for the refund of the earnest money. However, the appellant refused to refund the earnest money to the respondent. The appellant filed an application pursuant to O. 16 r. 2 of the Rules of Court 2012 seeking to join and add THAB as the second defendant on the grounds that:

(a) All matters in dispute may be effectually and completely determined and adjudicated upon.

(b) It would be just and convenient to have the issue relating to or connected with the earnest money be determined not only as between the respondent and the appellant but also as between THAB and the appellant as well.

Appellant's Submission

[6] The appellant submitted that their role as a stakeholder was to hold the earnest money as an agent for both the purchaser and the vendors and they have an obligation to both parties. The earnest money had been deposited by the respondent as a consideration to the vendors in accepting the respondent's offer to purchase their shares in SPLSB. Therefore, as one of the vendors, THAB was equally having a right and/or interest in the earnest money.

[7] The appellant submitted that, as there appears to be *prima facie* dispute regarding the release of the earnest money between the purchaser and the vendors, it is therefore absolutely prudent to bring all the parties involved in the disputes arising out of the same subject matter before the court so that the dispute can be effectually and completely adjudicated and determined upon without any semblance of delay, inconvenience and expense of a separate trial.

[8] The appellant submitted that the test in determining whether a person ought to be added as a party to an action has been authoritatively established by the Privy Council in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52 where the laid down the test as follows:

> [will] the proposed intervener's rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

[9] The test and objective in *Pegang Mining* can be found in O. 15 r. 6(2)(b) of the Rules of Court 2012 as follows:

> [a] to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action (see *Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29 @ 30, and
>
> [b] to prevent the same or substantially the same questions or issues being tried twice with possibly different results (see *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 @ 144.

[10] The appellant submitted that it is the substantive and fundamental right of the appellant to ensure that the appellant will not be vexed twice on similar or substantially the same cause of action as that of the respondent here through an action by THAB subsequently; and any decision pertaining to any issues relating to the earnest money will equally be binding upon the THAB.

[11] The appellant also submitted that they are not claiming any interest in the earnest money. Instead, what the appellant sought to achieve was that they would be acting correctly and in accordance with the law when releasing the earnest money to the purchaser or the vendors, as the case may be. It may very well be true that, at the end of the day, the court might rule that the earnest money has to be released to the respondent.

A **Respondent's Submission**

[12] The respondent submitted that the appeal ought to be dismissed based on the grounds that the respondent commenced legal proceedings against the appellant for the recovery of the earnest money and THAB does not have any legal right and/or commercial interest over the earnest money from
B 24 February 2014 onwards. The respondent's decision on 24 February 2014 not to proceed with the purchase of shares in SPLSB was final and conclusive. The respondent does not have any cause of action against THAB. The dispute, if any, is between the appellant and THAB and not with the respondent.

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[13] The respondent submitted that whether THAB's rights or liabilities in respect of the subject matter will be directly affected by an order which may be made in the action. The reliefs sought by the respondent will not affect THAB's rights and/or liabilities in respect of the subject matter. Under all circumstances, THAB is not liable to satisfy any judgment obtained by the
D respondent against the appellant. The terms and conditions of the stakeholding are clear and unambiguous – the appellant irrevocably and unconditionally undertook to refund the earnest money to the respondent within three months from 6 December 2013 should the respondent have decided not to proceed with the purchase of shares in SPLSB. As a
E stakeholder solicitor, the appellant is legally bound to act in accordance with the terms and conditions of the stakeholding. Therefore there is no ground which justifies the joinder of THAB as the second defendant since the respondent does not have any cause of action against THAB in the suit for recovery of the earnest money.

F **Findings**

[14] Applying the test in *Pegang Mining*, the court is to determine whether THAB's rights against or liabilities to the respondent in respect of the earnest money be directly affected by any order which may be made in the action. In answering the test, the court is of the considered view that the dispute
G arose when the respondent alleged that they decided not to continue with the said transaction and demanded for the release of the earnest money to them. As THAB was equally having an interest in the earnest money, if the appellant were to concede to the respondent's demand and release the earnest money to the respondent, the appellant will thereby expose themselves to
H possible action being brought by THAB against the appellant for wrongful release of the stakeholder sum. Instead, what the appellant as a stakeholder sought to achieve was that they would be acting correctly and in accordance with the law when releasing the earnest money to the purchaser or the vendors, as the case may be.

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[15] The role and duty of a stakeholder was explained in *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400, whereby the Supreme Court had clearly explained the duty of a solicitor who acts as a stakeholder as follows:

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v Finch* [1977] AC 728 who repeated what was said in *Mahoney v Hardy* (1970) 216 EG 1582:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding the deposit may part with it to neither contracting party without the consent of the other ...

[16] The court is guided by the above case that the appellant's role as a stakeholder was to hold the earnest money as an agent for both the purchaser and the vendors and that the appellant was having an obligation to both of the parties. The earnest money had been deposited by the respondent as a consideration to the vendors in accepting the respondent's offer to purchase their shares in SPLSB. Therefore, as one of the vendors, THAB was equally having a right and/or interest in the earnest money. Even after the 24 February 2014, it was evidenced that both parties had agreed to continue with the transaction of purchasing the shares and the appellant had been instructed by THAB to continue with the holding of the earnest money.

[17] The court is in the agreement with the appellant that it is absolutely prudent to bring all the parties involved in the disputes arising out of the same subject matter before the court so that the dispute can be effectually and completely adjudicated and determined upon without any semblance of delay, inconvenience and expense of a separate trial. Further, if the appellant were to concede to the respondent's demand, it will be an injustice done to THAB as he is not given an opportunity to be heard before any order or judgment be made in the action which will directly and adversely affect his rights/interests to the earnest money.

[18] Therefore, the court allowed the appeal with costs of RM3,000.